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IN THE

Supreme Court of the United States

OCTOBER, TERM, 1940

No. 404

SOUTHERN MINERALS CORPORATION, *Petitioner*,

v.

JAY SIMMONS, ET AL., *Respondents*

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals For the Fifth Circuit

SOUTHERN MINERALS CORPORATION,
By BIRGE HOLT,
Corpus Christi, Texas;

By DAN MOODY,
Austin, Texas;

By RALPH R. WOOD,
Houston, Texas,
Counsel for Petitioner

ALPHA LAW BRIEF CO., HOUSTON, TEXAS

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TO THE HONORABLE,
THE SUPREME COURT OF THE UNITED STATES:

Southern Minerals Corporation respectfully petitions this Honorable Court to set aside the order, heretofore entered in this cause, denying petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit and to grant said petition; and in support of this said petition respectfully shows this Honorable Court:

I.

It was the alternative contention of petitioner, Southern Minerals Corporation, in the Court of Appeals as well as in the District Court, that even though the well in question be, in fact, an oil well, as found by the District Court, respondents *did not own* but had, at most, a right only of *reasonable user* of gas produced therefrom, as a lift of the oil; and that since respondents were exceeding such right of user—in operating the well as a gas well and appropriating and selling the gas off the premises—petitioner was entitled to have such operation and trespass upon its real property right in the gas restrained and to damages for such gas as had theretofore been converted even though the well be an oil well. The Court of Appeals declined to pass upon such contention or to consider petitioner's specifications of error and points raising it. Tacitly the court did so because it was of the opinion that petitioner *having alleged the well to be a gas well* could be awarded no relief if the well be in fact an oil well, even though it be entitled, in such event, upon proof made without objection, claim of surprise, or change of theory, to the relief it prayed. In other words, the Court of Appeals held that petitioner was limited in its right of recovery to the facts pleaded by it regardless of its right under the facts proved. The court accordingly found it unnecessary to find, as a fact, whether the well was a gas well or an oil well; it *assumed* the well to be a gas well and decided the case upon that single assumption without considering petitioner's rights in gas from the well, in the event, as found as a fact by the District Court, it be an oil well. With respect to this matter the court said:

> "Much of the record is taken up with expert testimony as to what the product of this well was in the earth at the pressure and temperature obtaining there and whether the liquid separated out after production is oil; and the *briefs* make a question whether the well is to be classed

> as an oil well or a gas well according to what it taps in the earth or what it produces at the surface. *We enter on no discussion of these matters because it is unnecessary to decide them. We will assume that this is not a well 'producing as much as fifty barrels of oil per day,' but is a well 'producing merchantable gas in marketable quantities,'* ***" and accordingly a gas well,*** *"as described in the working agreement."* (111 F. (2d) 333, 336.) (Emphasis added.)

In its amended complaint upon which the case was tried, petitioner alleged "that defendants Jay Simmons and J. E. Webb in an unsuccessful effort to produce oil from the land drilled and on or about July 5, 1938, completed a well thereon producing, and capable of producing, great quantities of gas," and prayed for injunction restraining the appropriation and sale of the gas and for damages for gas and products of gas theretofore taken (R. 15-21). To this respondents answered, (1) that the well is an oil well and that respondents own and accordingly have the right to appropriate and sell gas produced therefrom with oil; but (2) in the alternative, if the well is a gas well respondents are entitled to all the products thereof (R. 22-27). Petitioner's rights in gas from the well in question, if it be an oil well, were, we earnestly submit, therefore clearly put in issue by the respondents' special pleading if not by petitioner's complaint.

Assuming, however, that under a technical and limited construction thereof, such rights were not put in issue *by the pleadings,* they clearly were raised by proof, made without objection by respondents, and were tried with their implied consent, as clearly evidenced by the announced legal conclusions of the District Court with respect to petitioner's right to the relief it sought not only (1) upon the assumption that the well is a gas well, but (2) also upon the finding of fact that it is an oil well (R. 41, 45-46). Petitioner's rights

in gas from the well in question, if it be an oil well, were likewise properly before and presented to the Court of Appeals by appropriate specifications and propositions (Petitioner's Brief, Court of Appeals, pp. 150, et seq.); to which respondents replied by counter-propositions (Respondents' Brief, Court of Appeals, pp. 148-204) without the remotest suggestion that petitioner was changing the theory from that upon which it had proceeded in the court below or that its rights in gas from the well in question, if it be an oil well, were not in issue or properly before the Court of Appeals. No claim has ever been made by respondents that they were surprised or in any way prejudiced by petitioner's assertion that it was entitled to the relief it prayed, even though the well be in fact an oil well, nor have they ever made the claim that if petitioner were entitled upon the facts proven to injunction and damages, it should be denied such relief because of any deficiency in pleading.

In this state of the record the decision of the Court of Appeals that petitioner (notwithstanding the proof made without objection) was limited in its right of recovery to the facts pleaded by it; that petitioner, having pleaded the well to be a gas well, could recover only in the event it was entitled to recover upon that fact assumption; and that accordingly it was unnecessary for the court to consider petitioner's rights in gas from the well in question if it be an oil well, is in direct conflict with the decision of the Court of Appeals for the Eighth Circuit rendered in the case of LIENTZ v. WHEELER 113 F. (2d) 767; 3 FED. RULES SERVICE 15 b.l, Case 2, *decided since petition for Writ of Certiorari was filed in this cause*. The decision of the court in that case upon the precise question here submitted and made with respect to the new FEDERAL RULES under which the instant cause was filed and tried, sufficiently appears from the following quotation from its opinion:

"The question presented by the first contention is whether under the circumstances present and upon the record in this case the court was authorized to grant recovery upon a contract different from the contract declared upon.

"There is a general rule to the effect that where a plaintiff sues upon an express contract he must recover upon that contract or not at all. Fay v. Missouri Power & Light Co., 33 S.W. (2d) 1056, 1058 (Mo. App.). Parties to a contract may by a subsequent valid agreement modify its terms; but in suits based upon such modified contracts, the contract as so modified must be distinctly pleaded. Koons v. St. Louis Car Co., 203 Mo. 227, 101 S.W. 49, 59. It is appellant's contention that these rules preclude recovery in this case and require a reversal. We think that in a proper case these rules have been modified by the Rules of Civil Procedure.

"In the instant case the plaintiff pleaded and relied upon a contract of employment for the years 1931 to 1936 inclusive providing for a salary of $5,000.00 per year. The defendant filed a general denial and pleaded a counterclaim as an affirmative defense in which it declared upon a contract covering the same period but providing for a salary of $3,600.00 for the year 1931 and $1,800.00 for each of the years 1932 to 1936 inclusive. The plaintiff by reply denied each and every allegation of the counterclaim. The court granted recovery upon a contract for a salary of $5,000.00 for the year 1931 and of $3,600.00 for each of the other years. The plaintiff did not object, did not appeal and did not amend his petition. In their pleadings neither party claimed that the contract provided for the payment of $3,600.00 a year for the years 1932 to 1936. No such issue was presented by the pleadings.

* * *

"The finding of the court that the contract in force for the year 1931 provided for a salary of $5,000.00 a year and that this contract was modified so that it provided for $3,600.00 a year for the succeeding years is supported by substantial evidence. *Both parties upon*

the trial contributed to the production of such evidence. The evidence was not objected to on the ground that it was not within the issues. It is a fair inference from the record that the parties impliedly consented to try the issue upon which the court's finding rests. The result is not, therefore, under the rule affected by the failure to amend the complaint.

* * * " (Emphasis added.)

A report of the decision in the case of LEINTZ v. WHEELER just referred to was not available to counsel for petitioner and did not come to their attention in time properly to present it in support of the petition for Writ of Certiorari. The Court of Appeals in the instant case could properly have declined to pass upon petitioner's rights in gas from the well in question, if an oil well, only because it was of the opinion that such rights had not been properly pleaded and were therefore not in issue; a consideration of them was accordingly held to be unnecessary to a decision of the case. It is now made clear that such holding of the Court of Appeals is in direct conflict with the decision of the Court of Appeals for the Eighth Circuit in the case herein referred to. In view of such conflict petitioner earnestly seeks a reconsideration of its petition for Writ of Certiorari and particularly of the first, second and third reasons therein set forth for granting it. It is primarily to supplement such reasons that the point here presented is made.

Petitioner submits that the Court of Appeals, in declining to pass upon petitioner's rights in gas from the well in question if it be an oil well, upon a claimed technical deficiency in the pleading without regard to the proof, has committed error to the very great detriment of petitioner. In failing to pass upon petitioner's specifications of error and points presenting such rights, the Court of Appeals has erroneously declined to apply to this case Rules 15 and 54 of the new Rules of Civil Procedure and, accordingly, has declined to determine

novel questions of substantive law of vital importance not only to petitioner in the instant litigation but to the oil and gas industry in general, or has, by implication, determined important questions of local law contrary to the decisions of the Supreme Court of Texas, all as pointed out in said petition for Writ of Certiorari.

II.

What has been said in the first part of this petition with respect to conflict of decision applies with equal force to the holding of the Court of Appeals in the instant case (111 F. (2d) 333, 336) that petitioner, having alleged in its complaint that respondents completed the well "in an unsuccessful effort to produce oil," was precluded thereby from contending that respondents had *not* complied with the contract conditions giving them the right, in the event the well be a gas well, to take the products therefrom upon petitioner's failure to exercise its option to take the well over, notwithstanding petitioner had established such contention by undisputed proof made without objection, as pointed out in the Petition for Certiorari as the third and fourth reasons for granting it.

The contract provision of the assignment from Houston Oil Company to Southern Alkali Corporation (petitioner's predecessor in title) gave the former, and in consequence respondents (as successors in interest to Houston Oil Company), the right to complete a gas well, and take the products therefrom, only in the event Houston Oil Company "as a result of its operations, discovered gas in any well" drilled by it "in an unsuccessful effort to complete a commercial oil well" and Southern Alkali Corporation, or petitioner, failed to exercise its option to take the well over (R. 389, 395).

Respondent J. E. Webb, a partner of his corespondent Jay Simmons and in charge of the drilling of the well (R. 221),

testified upon cross-examination without objection (1) that a good oil well could have been completed in three or four shallower sands and (2) that respondents did not discover gas in the well in question "in an unsuccessful effort to complete a commercial oil well" (R. 231-234). This evidence was material only upon the question of whether or not respondents had performed the conditions of the assignment above quoted giving them the right to complete a gas well and take the products in the event petitioner failed to exercise its option to take the well over. The testimony related to a matter particularly within the knowledge of respondents. It was admitted without objection or claim of surprise by the respondents as to proof of fact or as to theory upon which petitioner was proceeding. There was no claim that any prejudice resulted from the above quoted allegation of petitioner's petition nor that such proof was not within the issues made thereby.

This question, therefore, having been tried with the implied consent and without the objection of the parties the holding of the Court of Appeals that petitioner could not —because of the pleadings and notwithstanding the proof —recover upon the theory that respondents had not complied with the terms of their contract is clearly in conflict with the decision of the Court of Appeals for the Eighth Circuit rendered in the case of LIENTZ v. WHEELER (113 F. (2d) 767), referred to in the first part of this petition and decided since petition for Writ of Certiorari was filed in this cause. The point here made is intended primarily to supplement the third and fourth reasons set forth therein for granting the petition for Writ of Certiorari herein.

WHEREFORE, petitioner respectfully prays the court that this petition for rehearing be granted, that the order heretofore entered herein by this Honorable Court denying Writ of Certiorari be set aside, and that upon its petition for Writ of

Certiorari supplemented by this petition for rehearing, a Writ of Certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Fifth Circuit, at New Orleans, commanding said court to certify and send to this Court on a day certain to be named therein, a full and complete transcript of the record and of the proceedings had in said court in the case numbered and entitled on its docket No. 9183, Southern Minerals Corporation, Appellant, v. Jay Simmons, et al., Appellees, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States, and that the judgments of the Circuit Court of Appeals and of the District Court be reversed by this Court and judgment rendered for petitioner granting the injunction and damages as prayed, or in the alternative, that this cause be remanded to the Circuit Court of Appeals for a more complete statement of facts as found by that court and conclusions upon which its judgment was based, and for such other and further relief as to this Honorable Court may seem proper. Counsel for petitioner certify that this petition for rehearing is presented in good faith and not for delay.

DATED this the 11th day of November, A. D. 1940.

SOUTHERN MINERALS CORPORATION,
By BIRGE HOLT,
Corpus Christi, Texas;
By DAN MOODY,
Austin, Texas;
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By: Dan Moody
Of Counsel